



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

TRG
Docket No: 3872-01
15 August 2002

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) Case Summary
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, an enlisted member of the Navy, filed an application with this Board requesting that his record be corrected by removing the nonjudicial punishment imposed on 4 November 1999, and by promoting him to chief petty officer (AOC; E-7).

2. The Board, consisting of Messrs. Harrison, Pfeiffer and Bishop, reviewed Petitioner's allegations of error and injustice on 31 July 2002 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Petitioner's application was filed in a timely manner.

c. Petitioner reenlisted in the Navy for three years on 15 October 1997. At that time he had completed more than 12 years of active duty. On 15 December 1997 he reported aboard the USS JOHN C. STENNIS (CVN 74). He was subsequently selected for chief petty officer and was frocked to the rate of AOC on 16 September 1999, thus authorizing him to wear the uniform and perform the duties of a chief petty officer. The Board has not been able to confirm his promotion date. However, he was ranked 77 of 102 AOC's selected in 1999, which means he would be in the last 25% to be advanced from the 1999 selection list.

d. On 4 November 1999 Petitioner received nonjudicial

punishment for breach of the peace and assault with a deadly weapon, in violation of Articles 116 and 128 of the Uniform Code of Military Justice. The specifications read as follows:

Charge I on or about 5 October 1999, cause a breach of the peace by engaging in a loud verbal argument and pointing and unloaded firearm at EMFN Anthony E. (A), USN.

Charge II on or about 5 October 1999 assault EMFN Anthony E. (A), USN, by pointing at him a dangerous weapon, to wit: an unloaded firearm.

The punishment imposed included 30 days extra duty and a reduction in rate from his permanent rate of AO1 (E-6) to AO2 (E-5). In addition, it was directed that he be processed for an administrative discharge. A portion of the verbatim transcript of the NJP hearing that includes the statements of the witnesses is attached to enclosure (1).

e. Petitioner submitted an appeal of the NJP on 15 November 1999 contending that the punishment was unjustly imposed. He stated, in part, as follows:

..... I was devastated by the punishment I received at Captain's Mast on 4 November 1999. I was accused and punished for an act I did not commit. (the situation) escalated over a phone call that I made. The way the individual was talking on the phone I thought it was a joke at first, I thought it was someone that knew my voice and was playing on the phone. I made a bad judgment by trying to solve a problem in a calm face to face manner. I drove over to the address when I approached EMFA (A), which I did not know he was the individual on the phone, he threatened me with a beer bottle I was given an awkward looking stick by my acquaintance, which he found in the parking lot. I realized that (A) was going to be hard to reason with. So I gained control of the situation by discontinuing (sic) to argue with him. I apologized to the two ladies that were present for causing a disturbance and departed. The next day, during working hours, it was brought to my attention that I was being wrongfully accused of arming myself with a firearm. I cooperated with NCIS completely. The day the ship pulled in the NCIS agent searched my vehicle in the parking lot and then

proceeded with two NCIS agents to my apartment for a search that resulted in negative findings. The NCIS agent also conducted a criminal background check, which also resulted in negative findings. I was administered a polygraph. I was in turmoil about the whole situation of being wrongfully accused because I had never been in any trouble. The NCIS agent told me the results were inconclusive. This incident could have been resolved at a lower level due to the following facts:

The type of firearm was never found.
The police were never called.
There was no physical contact.
All five witnesses had been drinking.

This is a very disappointing event in my naval career that I find very hard to deal with. I have dedicated my career to helping every sailor that I can. A five-minute incident over a misunderstanding should not have ended with the severe and unjust punishment I received on 4 November 1999. I was reduced from a frocked chief and proudly wearing my chief uniform to an E-5, and I was removed from the ship fifty minutes after I came out of Captain's Mast This punishment has placed me in a financial hardship. When I purchased my chief uniforms I donated my E-6 and below uniforms to Sailors throughout the ship.

A copy of the entire NJP appeal is attached to enclosure (1).

f. The commanding officer's endorsement on Petitioner's NJP appeal recommended that the appeal be denied and stated, in part, as follows:

.... On 5 October 1999, AO2 (AW/SW) (Petitioner) (then a frocked Chief Petty Officer) called the house of a shipmate, EM3 (B). Another shipmate EMFN (A), answered the phone. (Petitioner) and ENFN (A) got into a verbal argument over the phone, which ended when ENFN (A) gave (Petitioner) the address to EM3 (B's) house.

... (Petitioner) then drove with a friend, identified only as 'rip', to EM3 (B's) house. Once he arrived, he confronted EMFN (A) in the parking lot just outside. After arguing for a period time, (Petitioner) backed away from the argument and then returned brandishing what has been identified as a TEC-DC9, an

assault weapon.

... After this weapon was brandished, the parties dispersed. Of the five witnesses who saw the weapon, none of them informed the police, although they informed the command the next day.

... At mast, I heard from four eyewitnesses, each of whom knew the accused and had been friendly with him in the past. Each of these witnesses stated that they saw a gun in the hand of (Petitioner). Additionally a fifth witness, a Marine Lance Corporal who had been just recently introduced to one of the witnesses and didn't know any of the parties involved, picked (Petitioner) out of a photo lineup and clearly stated, in a sworn statement, that he saw a gun he identified as a TEC-DC9.

... All of the testimony I heard at mast matched the written statements given by the witnesses almost a month earlier as part of the thorough NCIS investigation completed in the case. Additionally, the testimony given by (Petitioner) matched almost perfectly except on the point of whether he held a gun or a stick.

... I heard testimony from eight former or current members of (Petitioner's) Chain of Command, as well as the testimony of four character witnesses he requested. Each of these made extremely positive comments about his performance as a Sailor as well as his unlimited potential as a Chief Petty Officer.

... By a preponderance of the evidence I found that (Petitioner) knowingly committed each of the charged violations as modified. Originally, each of the two charges made reference to a "loaded firearm." Because there was no evidence that the gun was loaded, I removed each reference to the firearm being loaded. This changed the Assault charge to a "Simple Assault with an unloaded firearm."

... (Petitioner) is correct in his claim of superior service to the Navy throughout his career. That does not, however, change the fact that he willfully violated the UCMJ by committing serious crimes against shipmates. I cannot allow any Sailor, let alone one

wearing Khaki of a Chief Petty Officer, to assault others with a weapon. I therefore, awarded him an appropriate, proportional punishment.

g. On 13 December 1999, the NJP appeal was denied by the Commander, Carrier Group Seven. It states in the denial letter, in part, as follows:

.... You contend your punishment was unjust. In your appeal, you admit to using poor judgment by driving to EM3 B's house and confronting EMFN A. You claim, however, that you were punished for an act you did not commit, and you produced an unsigned, unsworn letter from your friend "Rip", to corroborate your story. The burden of proof at NJP is a preponderance of the evidence. Five individuals - each of whom witnessed your behavior on 5 October 1999 - testified that you argued loudly with EMFN A and waved a large gun at him.

Copies of the endorsement and final action on the NJP appeal are attached to enclosure (1).

h. Petitioner was processed for an administrative discharge as directed by the commanding officer. An administrative discharge board (ADB) met on 20 December 1999, and unanimously found that he had not committed misconduct. Consequently he was retained in the Navy. Nevertheless the commanding officer refused to set aside the NJP. Because of the finding of no misconduct, a transcript of the ADB hearing was not prepared. However, his counsel during the ADB submitted an affidavit setting forth the reasons why he believed the witnesses were not credible and the accusations made against Petitioner were false.

Counsel presents an analysis of each of the statements made against Petitioner and concludes that Petitioner did not have a gun during the altercation. Concerning EMFN A's statement and testimony, he states as follows:

After reading EMFN A's statement and transcript of his testimony, interviewing him and witnessing his testimony at the (ADB) it was clear to me that EMFN A could not give consistent detailed statements. When he was cross-examined, by myself as well as the Captain, he gave inconsistent and evasive answers. He appeared to be fabricating his story.

The counsel concludes as follows:

There are some points about all of the witnesses in general that indicate that they were fabricating their stories. All of the witnesses were friends. All of the witnesses talked to each other before making statements. None of the witnesses reported the incident until days later. All of the witnesses gave inconsistent details when they recounted their stories at various times. Despite the fact that (two of the witnesses) said they saw a gun neither called the police, even though they were looking out of the apartment window with the telephone right next to them.

A copy of counsel's affidavit is also attached to enclosure (1).

i. Since the NJP and the ADB, Petitioner has reenlisted and continues to serve in an excellent manner. His current command states he is doing an outstanding job and supports his request for corrective action.

j. In his application, Petitioner essentially reiterates his version of events. He admits to going to the apartment and engaging in a verbal altercation with EMFN A, but continues to assert that he did not have a gun. He states that his friend handed him a stick to defend himself because EMFN A was intoxicated and holding a beer bottle in a threatening manner. He has submitted numerous character references attesting to his good conduct and excellent performance of duty. In addition, there are submissions from senior enlisted personnel contending that the NJP was unfair. One of these is an unsigned submission from a retired master chief who contends that there were four NJP's involving black chief petty officer's, but white chiefs were not taken to NJP. All the statements are attached to enclosure (1).

CONCLUSION:

Upon review and consideration of all the evidence of record the Board concludes that Petitioner's request warrants favorable action. The Board notes the conflicting finding of the commanding officer at the NJP and that of the ADB. Although the transcript of the ADB is not available, the Board believes that the affidavit of the defense counsel accurately indicates that the ADB found the witnesses lacking in credibility. It appears to be undisputed that EMFN A continued to be disrespectful to Petitioner even after he identified himself. Although it may have been an error of judgment to confront EMFN A, the Board does not believe that standing alone, it justifies the severe punishment imposed on Petitioner, essentially a reduction of two

pay grades. The Board also notes Petitioner's excellent service both before and after the NJP and the support he is receiving from his current command. Given the circumstances, the Board concludes that the NJP of 4 November 1999 should be removed from Petitioner's record, which means that he will be reinstated to his permanent grade of AO1. The correction should include but not necessarily be limited to the removal of documentation concerning the NJP and the performance evaluation for the period of the NJP.

After considering whether the facts of this case would have warranted the removal of his recommendation for chief petty officer even if NJP had not been imposed, the Board concludes that any doubt should be resolved in his favor because of his excellent service after the NJP. In this regard, the Board notes that he has served for over two years as an AO2, which adequately punishes him for any error in judgment. Therefore, he should be advanced to chief petty officer on the date he would normally have been advanced or in the last increment for promotion if the actual date cannot be determined.

RECOMMENDATION:

- a. That Petitioner's naval record be corrected to show by removing the NJP of 4 November 1999 and all related documentation from this record.
 - b. That Petitioner's naval record be further corrected to show that he was advanced to chief petty officer on the date he would have been advanced absent the NJP, or on the last increment if the advancement date cannot be determined.
 - c. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.
 - d. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and

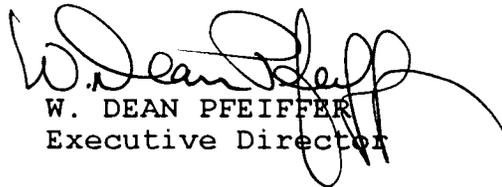
complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder



ALAN E. GOLDSMITH
Acting Recorder

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.



W. DEAN PFEIFFER
Executive Director